UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. S2 14 Cr. 810 (CM)

MOSHE MIRILISHVILI,

Defendant. Trial

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New York, N.Y.
March 16, 2016
9:50 a.m.

Before:

HON. COLLEEN McMAHON,

District Judge

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
EDWARD DISKANT
BROOKE CUCINELLA
Assistant United States Attorneys

HENRY MAZUREK
WAYNE GOSNELL
Attorneys for Defendant

ALSO PRESENT: MICHAEL MULLER, DEA
ELIZABETH JOYNES, Paralegal
MICHAEL DOMANICO, Paralegal

(Trial resumed; in the robing room)

THE COURT: I want to get a preliminary matter out of the way and then I want to let the jurors go get coffee. You should just know that the lights go off in this building at 8:15. I was here until 8:15 when the lights went off. And to the extent that stuff came in for me at 9:10 this morning, I've had 20 minutes to look at it. It's just not fair to me. It's just not right.

But I want to get one little matter out of the way. Among the many extraneous things that were going on in my chambers and in this case yesterday was the search for juror No. 9. We had various reasons for wanting to find juror number 9. I was thinking about sending him a contempt citation because never in my 20 years of being a judge had a juror simply disappeared. Mr. O'Neil, who is a much nicer person, was worried that something might have happened to him, and the jurors were pestering him with questions about juror number 9. Was he ok. He wouldn't just do this. It's nice to know that they have all become friends. It's very lovely.

We did locate juror number 9 at the end of yesterday. He is in the hospital and could not have contacted us on Monday. I could forget about sending him about a contempt citation. I would like to bring the jurors in, say good morning, say I hear you are worried about your friend, juror number 9. Don't worry, he's fine. We have been in contact.

MR. MAZUREK: Is he ok?

THE COURT: I don't want to get into his medical. Let me just say this. We are all very lucky that he's not on this jury, all of us. Anyway, we didn't know quite everything there was to know about juror number 9. Anyway, the long and the short of it is, I would just like to say, don't worry about him anymore, he's ok, calm them down on that and send them out to get coffee, and continue to deal with this.

MR. MAZUREK: Agreed.

THE COURT: Let's do that first.

(In open court; jury not present)

THE COURT: We are going to bring the jurors out and then we are going to send them out on a little coffee break.

(Jury present)

THE COURT: Good morning. We had some legal issues come up at the end of the day. I've had briefs that were submitted to me at late as 9:25 this morning. You should know this is not rare. At the very end there is always something. As Roseanne Roseannadanna used to say on the old days on Saturday Night Live, it's always something. I need to thrash some of those things out with the parties. I am going to send you out for some coffee.

I did hear through Jim that you were concerned about juror number 9. I have to say, it warms my heart to know that you guys in this very short period of time have bonded and

become a team and that you care about all the members of the team. He's fine. He did have a medical problem. He wasn't able to get in touch with us on Monday, but we were in touch with him yesterday. I just wanted you to know that so that you wouldn't worry about it. You can get that out of your heads.

I would like you to go away for half an hour to Starbucks again and come back refreshed and ready to go. Don't discuss the case. Keep an open mind.

(Jury not present)

THE COURT: I am going to get rid of part of this right now. Sit down. I've been confronted with multiple mistrial motions. The defense mistrial motion on the ground that the government unfairly commented on the difference in the defendant's prescribing patterns for 2010 to '13 is denied. It is absolutely true that the jury does not know anything about the nature or circumstances of Dr. Mirilishvili's practice in 2010 and 2011 except that he prescribed a lot less oxycodone during those years and not all of the prescriptions he wrote were in the same amount.

The reason that the jury does not know anything more is, I granted the defense pretrial motion to keep information about his previous medical suspension and his probationary status out of the record. Otherwise, the government would and could have argued that the minute that the defendant was out from under the watchful eyes of the authorities, look what he

did, he set up a pill mill and started prescribing loads of oxycodone in identical amounts.

I see nothing wrong with the government's arguing that this change over time is evidence that can be considered in connection with the jury's deliberations. The fact that the defendant began prescribing oodles of oxycodone and that every single patient got the same amount is highly relevant to the issue of whether he conspired with others to distribute narcotic drugs in violation of the law. In that sense, of course, the evidence of his earlier prescribing patterns is indeed prejudicial to the defendant, but because there is real probative value to the change, because it goes to the elements of the existence of a conspiracy and the defendant's knowledge and intent, it is anything but unfair prejudice.

I will say this. It is far less prejudicial to the defendant that the jury does not know that he was on probation and under supervision during the period when his prescription pattern involved a lesser percentage of oxycodone prescription and in varying amounts. The defendant really shouldn't look a gift horse in the mouth. It asked me to preclude the government from making that argument about the watchful eye of the government, and I did so.

In any event, the defense had ample opportunity in closing to comment on the weakness of the government's argument due to the jury's lack of knowledge of any of the details about

Dr. Mirilishvili's practice of medicine during those years other than his prescribing patterns.

The mistrial motion, because of the introduction of the defendant's tax returns and the government's comments on his variance in income is denied for substantially the reasons that I have put on the record on the multiple, multiple times that we have dealt with this.

That's out of the picture. The only issue -- and all of the misconduct issues are going to be denied. All of the government misconduct motions are going to be denied. Absurd.

I left here yesterday with one thing on my mind. I was concerned that Mr. Diskant had gone beyond the evidence in his rebuttal summation. I'll confess, I was concerned for the wrong reason. There were so many things going on. I had confused in my head Government Exhibits 1102 and 1103 and DM1 and DM2. Believe it or not, I really did that. I really did that. And for a moment I forgot. Half an hour after you left, I was disabused of this notion, that more than one tape had actually been introduced into evidence. To the extent that I barked at Mr. Diskant yesterday because of what I was thinking, it was unwarranted because I was making a mistake. All right. Fine.

I will say that the argument which was made yesterday, which was that the comment on Government Exhibit 210, I think it is, the patient records, the fact that it was blank somehow

went beyond the evidence is patently erroneous and patently unfair. And I came in here this morning prepared to deny the motion and we were going to go into the summation.

I now have a completely different mistrial motion. I have a completely different mistrial motion that's been made on the ground of going beyond the evidence in summation. I really have to think some thicky things through, so excuse me for a moment.

(Recess)

(Continued on next page)

(In open court; jury not present)

THE COURT: The only mistrial motion that was initially troubling to me -- which was the mistrial trial motion based on allegedly improper argument concerning the doctor's treatment of Jose Lantigua -- as I have explained, I was originally troubled because of my mistaken recollection of the record. So, let's deal with DM-1 and DM-2. I am now actually quite clear about what DM-1 and DM-2 said, because I have just read them five times.

A little background: Prior to the trial I was advised that the defendant might want to introduce tapes of additional conversations into evidence marked as DM-1 and DM-2, which the government did not wish to introduce into evidence. The government opposed that because the tapes were hearsay as to the doctor since they contained his own out-of-court statements, and it argued -- correctly, in my view -- that they were not admissible under the rule of completeness simply because they dealt with Jose Lantigua.

I did not rule on that motion on the merits prior to trial; I said it was premature. I said let's see how the trial unfolds and whether the defense wants to introduce the tapes.

On Monday of this week I got to my office to find letters from both sides on my desk, and in one of those letters Mr. Mazurek renewed his motion to admit DM-1 and DM-2, and at the beginning of the day on Monday I denied that motion --

that's at page 1084 of the transcript -- for substantially the reasons articulated in the government's letter of opposition.

And since it came up yesterday in my own thinking, it was not principally because DM-1 and DM-2 were duplicative of the earlier tapes -- although in the main they are -- but simply that because they were hearsay being offered by the defendant to bolster his argument already amply supported by other evidence, including the contents of the first three tapes, that the defendant could not prove beyond a reasonable doubt that he was not acting as a physician in his dealings with Mr. Lantigua. And, as I have noted before, they were not admissible under the rule of completeness.

The new defense argument appears or appeared to me last night to be more or less a variant on the rule of completeness motion.

The defense argues that the government was asking the jury to draw conclusions about Dr. Mirilishvili's dealings with Mr. Lantigua based on just part of the interaction between the two of them. That's true as far as it goes, but there is no rule which I am aware that the government has to introduce everything about the interactions between the defendant and the confidential informant before it can ask the jury to draw an inference about the nature of their relationship. There is no rule of completeness that requires the government to tell what the defendant thinks is the whole story.

The rule of completeness only permits the opposing party -- in this case the defendant -- to introduce additional portions of an out-of-court statement so that portions introduced by the government will not be misleading due to the fact of their incompleteness.

Assuming arguendo that this rule could be extended to entirely different conversations -- a proposition I reject -- but assuming I were wrong, there is nothing about DM-1 and DM-2 that clears up anything that would be otherwise misleading about Government's Exhibits 1101, 1102 and 1103.

Turning to the argument that was made in open court yesterday, to the extent that Mr. Diskant argued from the blank patient record GX 10 that the doctor was not acting as a physician, that record is in evidence, and it shows what it shows, which is that the doctor did not bother to fill out a pain record for this particular "patient" Mr. Lantigua, even though he continued to prescribe oxycodone for him.

That argument -- which the government made in its main closing without objection -- does not make the hearsay tapes admissible. No matter how many visits they had, Dr. Mirilishvili never filled out a patient record for Mr. Lantigua. The government did not speak inaccurately or go beyond the evidence in so asserting.

So, based on the record that was before me when I left here last night, I was prepared to simply adhere to my original

ruling. This morning, however, I was handed a bunch of new letters, including a very long letter from the defendant, and that letter contained a new and far more elaborate argument as to the admissibility of DM-1 and DM-2.

Basically the argument is that Mr. Diskant said in rebuttal that the defendant would ask his patients about referrals and physical therapy and surgery, and none of those things "ever happened".

The defense argument is that DM-1 and DM-2 indicate that it was a misstatement of fact, because on at least one of those tapes Mr. Mirilishvili was told that these things did in fact happen; statements were made to him to the effect that the confidential source went to an orthopedist.

The government responds that all it ever said was that none of this ever happened "on those tapes," so it was fair comment and all within the bounds of the evidence. The government happens to be technically correct about that.

But I nonetheless have looked at DM-1 and DM-2 in considerable detail. I have read them over multiple times to see if there is anything on them that is arguably inconsistent with anything that Mr. Diskant said.

There is nothing on DM-1 that is arguably inconsistent with anything that was said. DM-1 contains the same litany of questions that Dr. Mirilishvili asked Mr. Lantigua on the tapes that are in evidence. It contains some indication that he

conducted the sort of examination of Mr. Lantigua that you can tell about from the tapes that are already in evidence. It contains information about a prescription, a pharmacy and a request that the urine sample be left next to the garbage; and all of that you can find on the other tapes. Lantigua's responses to the doctor's questions on DM-1 are perfectly consistent with the responses that were given on Government's Exhibits 1101, 1102 and 1103.

The only thing that is arguably different -- and of course that's what the defendant highlights in their letter motion -- is that Dr. Mirilishvili gives a little speech admonishing Mr. Lantigua to follow through on referrals -- which is why I'm sure that's what the defense wants the jury to hear -- but there is nothing inconsistent between anything that the doctor said on DM-1 and the government's rebuttal argument.

So, to that extent the motion for a mistrial lacks merit, and the introduction of that tape would only bolster a defense argument that can be made based on the evidence that's already in the record and fully admissible, and so I see no reason to alter my original ruling with respect to DM-1.

DM-2, however, contains a statement that is arguably inconsistent with the government's argument, because during that visit -- unlike all the other visits -- Mr. Lantigua tells the doctor, yeah, yeah, he used a referral, and the doctor told him he should have back surgery next year. As a technical

matter this is not more of the same, although I do note that at the end of this particular interaction Dr. Mirilishvili says we will decide if you do the surgery, and he will send off for a second opinion, which I'm sure the government will argue is the same putting off.

But to the extent that the government said in rebuttal in the most general of terms that none of those things about the referrals ever happened, DM-2 has words on it that were said to the doctor that might fairly imply otherwise. And to that extent, it could be said that the government's arguments went beyond the evidence and were unfair because they were inconsistent with something that was known to the government.

It's a very tiny point. Of course the tape is only admissible for the fact that the words about the orthopedic surgery were said. The statement's made by Mr. Lantigua, and it's not admissible for the truth of what he was asserting, and we all happen to know as a confidential source he didn't go to any orthopedist. We all know that.

But unfortunately I do think that the defense has raised a fair enough point so that I will reopen the record to permit the following portion of DM-2 to be played: Page 2 of the transcript, line 18 to page 3 of the transcript at line 19.

I considered admitting page 4, lines 4 and 5, but the answer is unintelligible, and it can't be admitted if you don't know what was said to the doctor, so I'm not admitting that.

I will also allow page 4, line 21 to page 5, line 3 to be admitted. The rest of the tape is not admitted for the same reason that DM-1 is not admitted: It does not even arguably contradict anything that the government said in its rebuttal summation.

I will give each side -- first the defense and then the government -- exactly five minutes to comment on anything it wishes to comment on in light of my introduction of that portion of the tape.

There is no need to introduce any of Dr. Mirilishvili's statement about prescribing drugs, because his prescription records are already in evidence, so his hearsay statements would only be bolstering. Given this ruling, I see no need for the government to attempt to reopen the record, but I do want to address one other thing.

The defense again mentions in its argument that the tapes are admissible as a whole because they are offered to prove the truth of the defendant's state of mind. But I spoke about the state of mind exception at the beginning of the trial when I did not rule. I said at the time that no individual statement of the defendant in the tapes appear to reflect state of mind in the same way as was the case in DiMaria and Harris.

The defendant's position was and is that the entire tape was admissible to show the defendant's state of mind during his dealings with Lantigua. He was not seeking to

introduce just selected statements by the doctor but the entire interchange.

I respectfully disagree that the entire tape is admissible to show state of mind. The government has to prove that the defendant was acting outside the normal scope of medical practice, and the defense wants the jury to conclude that the government has not proved that by offering evidence to show that he was in fact acting like a doctor.

Whether the defendant was acting as a doctor in his dealing was Lantigua is not his state of mind; it is a fact; and it is indeed the ultimate fact at issue in the case. It is the thing the government must disprove beyond a reasonable doubt. That is why the defense wants the jury to hear those tapes, not because his client is expressing a motion or a belief on them -- which would indicate state of mind -- but because it argues his client is acting like a doctor, from which the defense argues -- as it has already argued, based on the tapes the government did introduce, and on other evidence as well -- that the defendant was prescribing drugs for legitimate medical purposes and well within the scope of the usual medical practice.

The Second Circuit has made it very clear that the state of mind exception cannot be allowed to swallow up the usual rule which prohibits the introduction by the defendant of his own out-of-court statements in order to prove the truth of

the matter asserted. That is effectively what the defense seeks to do here.

The defense seeks to introduce the statements to rebut the government's argument that it has proved beyond a reasonable doubt that he was acting like a doctor. All right? The truth of the matter asserted in the tapes is that he was acting as a doctor. That is the truth of the matter asserted by the tape as a whole, as opposed to by any individual statement. No individual statements are offered. The tape as a whole is being offered.

And I note that even if one could stretch the state of mind rule in the manner proposed by the defendant, the exclusion of these two tapes -- unlike the exclusion of the defendant's statements in DiMaria and Harris -- does not effectively preclude the defendant from making the argument he want to make. Indeed, he has already made it and most forcefully. He can make -- and has already made -- the argument by relying on the tapes of his interactions of Lantigua that are already in evidence, and on his cross-examination of Correa, who was present during those visits, and also on other evidence in connection with other persons who presented themselves at his office. By offering these additional tapes, the defendant simply seeks to bolster the argument he has already made with more of the same.

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THE COURT: And that was my ruling on Monday. Were I to reverse course and admit the tapes in their entirety I would also have to permit the government to decide whether it wanted to reopen this case because I ruled them out on Monday. So when the government was deciding about its rebuttal case, it assumed that the tapes were not going to be in evidence. I don't really think that we need to go there because I think the right thing to do is to play very tiny portions of the one tape, DM5, and then reopen the argument for a brief period of time and then charge the jury.

MS. CUCINELLA: Your Honor, may we address one issue.

THE COURT: You will. Then they will. You have one minute. 30 seconds. 90 seconds.

MS. CUCINELLA: Certainly. The defense is obviously looking to introduce the second tape with that statement on it. The fact that Mr. Lantigua is seen two more times and is asked about the same referrals and gives again evasive answers we think is directly responsive to that and is relevant to the fact --

THE COURT: You know what, I take it back. Why I have wasted all this time. We are going to put in all four tapes. I assume if their tapes go in, your tapes go in because you would have wanted to do it on rebuttal.

MS. CUCINELLA: Exactly right.

THE COURT: I'm done with this. We are going to

listen to all four tapes. You still only have five minutes.

Jim, we are going to listen to all four tapes because the government just really wants that to happen, all four tapes in their entirety.

MR. DISKANT: Your Honor, it's going to take us some time to get the transcripts.

THE COURT: It better take not very much time. It's 11:30. Can we bring the jury in.

THE DEPUTY CLERK: Tell them within five minutes.

THE COURT: I'd like them to come in and I am going to explain to them what's going to happen.

MS. CUCINELLA: We will go back to the original ruling. We don't have transcripts for the other two ready to go.

THE COURT: They can listen. I'm not going back to the other ruling. Sorry. Not me. Bring the jurors in, please. Would you bring the jurors in. You guys are two minutes away from a Xerox machine.

(Jury present)

THE COURT: Don't get too comfy. What happened is, we are going to have to reopen the record, basically, so you can listen to four more tape recordings and listen to five minutes of argument from each side about the implications of those tape recordings. That's what all this whoop dee do has been about. Then you are going to have lunch because I am not going to

charge you until you have a full stomach. Early lunch ready to go.

You are not going to believe this, but they are moving my office as we speak. My furniture is being paraded through the building. It's been quite a morning.

What we are doing is, we are making photocopies of the transcripts of the last two of those four tapes, maybe of all of them. I am not sure. Of all four of them. Give us like 10 minutes to get the Xerox machine cracked up so we can get you transcripts. I just wanted you to know what's happening.

Don't discuss the case. Keep an open mind.

THE DEPUTY CLERK: They want to know if they can go out of the jury room.

THE COURT: I would like to get this moving, folks.

(Recess)

THE COURT: Good morning. We are going to listen to four tapes. The first is labeled DM1. I believe you have a transcript. It is the tape recording of a visit by the confidential source to Dr. Mirilishvili's office on what date?

MR. MAZUREK: On October 18, 2013.

THE COURT: Please play.

(Audio recording played)

THE COURT: The next tape you are going to hear is another visit. This is DM2 and that visit took place on November 20, 2013.

(Audio recording played)

THE COURT: The next tape is going to be Government Exhibit 1104, and the date of this tape is, I believe, January 16, 2014.

(Audio recording played)

THE COURT: Mr. Mazurek.

MR. DISKANT: One more, your Honor.

THE COURT: I forgot about the last one. Sorry.

MR. DISKANT: 1105.

THE COURT: It's February 25.

MR. DISKANT: Yes, your Honor.

(Audio recording played)

THE COURT: Mr. Mazurek.

MR. MAZUREK: Thank you, Judge. Good afternoon, members of the jury. I didn't expect to see you again, but here I am. Yesterday Mr. Diskant said in his rebuttal summation that the questions that the defendant asked about referrals and about physical therapy and about surgery, you saw, if you looked at the recordings, none of those things ever happened. It's just part of the game. When Mr. Diskant said that, he wasn't being truthful with you.

You heard now the other recordings between the confidential source and Dr. Mirilishvili, and one of the things I am going to point your attention to, in the November transcript of one of those visits, this is what the doctor

said: This is for your benefit. Why do you think I'm giving you these referrals? I just want to waste my time and your time? I want to know. I want to know if they can remove the cause of your pain and I want to know if you're rebuilding your muscle ligaments.

Ladies and gentlemen, this is the words of a doctor performing in the usual course of medical practice and exercising medical judgment. Just as I cross-examined Dr. Gharibo, the government's expert, he said, would you want to know, what can you do with respect to referrals. You can coax. You can try to urge your patients to go to the doctor and get the referral and the other help that you can get.

And the subsequent visit you heard now in December -- I'm sorry. I think in November in DM02. Jose Lantigua tells Dr. Mirilishvili that he has surgery scheduled with the orthopedic for the next year. And Dr. Mirilishvili says, ok. Let's get the report. When you are ready to get the surgery you are going to have the second opinion. These are the things a doctor does. The government didn't want to you hear those recordings because they show that Dr. Mirilishvili was --

THE COURT: The objection is sustained. You will disregard that comment, ladies and gentlemen. You will disregard that comment and you will not repeat it.

MR. MAZUREK: Yes, your Honor.

These recordings show, ladies and gentlemen, that the

doctor was acting as a doctor and not as a drug dealer. Each of these visits, ladies and gentlemen, you will know are actually recorded in GX510 in the handwritten notes of Dr. Mirilishvili. The surgery, the notes that surgery was scheduled for the next year is in GM510 at page 26 on the handwritten notations. Dr. Mirilishvili was acting as a doctor. Each time at the beginning of each of these visits he explains -- and I'm sure Mr. Diskant is going to come up and say that what he was doing was saying, oh, the last visit you said you had lower back, lower extremity pains. Each time he was explaining what the original complaint of the patient was. And he also each time was asking how is your pain after being on the medication.

The confidential source was instructed by the DEA how to answer each of these questions. He was saying the pain is zero. As Dr. Gharibo said on cross-examination, if the patient is doing well in continued treatment, you keep that patient on that medication and that's exactly what Dr. Mirilishvili did. The fact that the surgery never happens is not surprising because this is not a real patient. There was someone brought in by the DEA. But the fact that Dr. Mirilishvili continued the patient on the medication through the February visit is actually in accordance with real medical judgment and real medical practice.

THE COURT: You have 30 seconds.

MR. MAZUREK: Ladies and gentlemen, the follow-up interviews, the follow-up responses of Dr. Mirilishvili saying that why do you waste my time and your time. He cared about the patients. He wanted to know from this patient that he was doing the thing that could remove the cause of his pain. Why waste my time and your time. I want to know that you can eliminate your pain. That is what acting like a doctor is. This evidence is absolutely consistent with the fact that the doctor was acting as a doctor and you must return a verdict of not guilty. Thank you.

THE COURT: Mr. Diskant.

MR. DISKANT: Thank you, your Honor. What the government has told you all along is that this was a script, that the questions and answers don't matter. And the additional recordings you've heard this morning just confirm that.

Yes, in one of those visits the CS, Jose, says that he's having surgery. Look at what happens in the next visit. Jose comes back and they go through this again. Look at the fourth page of the January recording. It's like we are starting all over again. Have you done anything with the referral? He says: When is the appointment for? Two months, two months from now. There is no mention of the surgery. They are back to him still waiting to see the doctor.

Let's go to the February one, the last one. Keep in

mind at this point he has been seeing the defendant for eight months, month after month after month. Look at page 4 of this one. We do it all over again. Did he use my referrals? Did see an orthopedic doctor, the defendant asks? The CS asks: I'm waiting to get back from vacation from work. It's just the same questions over and over again. Why? Because the answers don't matter.

You heard him switch pharmacies, by the way. He didn't switch to any pharmacy. He switched to another one of the ones the defendant used. Take a look at Government Exhibit 106. Where does he send him? The next one down the list, Broadway Downtown Pharmacy, another one of the places the defendant used.

By the way, in the 15 minutes worth of recordings you listened to, the defendant made $800 in cash, and he wrote for the day a prescription for 90 30-milligram tablets in each and every one. $800 in cash, 360 oxycodone tablets, 15 minutes of the same questions and answers over and over again. That's what this case is about. Thank you.

THE COURT: I want it to be clear that I was asked to and I reviewed and I reversed an evidentiary ruling yesterday, last night, and this morning. That's the reason that you heard the additional tapes today. You are not to speculate about why I did it. It's on me and that's the end of it.

I am actually going to start the charge, do the

beginning of the charge, because I have a 1:00 meeting that I have to do today, as I was reminded by my courtroom deputy, Maria. She said you can't miss it.

THE COURT: Here we go. Let's get started. By the way folks, you are going to have copies of the charge back in the jury room. You don't have to take notes. Sit back and relax and listen.

Ladies and gentlemen, now that you have heard all of the evidence that's to be received at the trial and arguments of the lawyers, it is my duty to give you final instructions about the law that's applicable to the case and that will guide you in your decisions.

Remember that all of the instructions I give you, the ones I gave you at beginning of the trial, during the trial, and these final instructions, will have to guide and govern your deliberations.

It is your duty as jurors to follow the law as stated in all of the instructions of the Court and to apply these rules of law to the facts as you find them from the evidence that was received during the trial.

Counsel referred to some of the applicable rules of law in their closing arguments to you. It's not surprising because we spent a lot of time talking about them before we finished the charge. However, if what counsel says about the law differs from what I say about the law, you are to follow

the instructions given to you by the Court.

And the perfect example of that is that poor Ms. Cucinella was out of the room when we made a change in something that I was going to say. She was working off an old draft of the charge and she said something that I changed as a result of the conversations we had in here. So we corrected her right away, but just remember, what I tell you about the law is what controls.

You are not to focus on any single instruction but you have to consider my charge as a whole in reaching your decisions.

You must not be concerned with the wisdom of any rule of law that I give you. Regardless of any opinion you may have about what the law ought to be, it would be a violation of your sworn duty to base any part of your verdict on any view of the law or any opinion of the law other than the one I am going to give you in these instructions, just as it would be a violation of your sworn duty as judges of the facts to base your verdict on anything but the evidence that's been received in the case.

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THE COURT: Now, as I told you at the beginning of the trial, a criminal indictment is not evidence. It merely describes the charges that are made against the defendant. An indictment is a formal method of bringing a case into court for trial and determination by a jury. You may draw no inference of any kind from the fact that the defendant was indicted. Under our law, a person who has been accused of a crime is presumed to be innocent. Therefore, you may not consider the fact that the defendant was accused of crimes as evidence of his guilt.

The fact that the prosecution is brought in the name of the United States of America entitles the government to no greater consideration than you would give to any other party in a litigation. By the same token, the government is entitled to no less consideration. In your deliberations, you are to perform your duty without bias or prejudice either to the government or to the defendant. Remember that all parties, government and individuals, stand as equals before this court of justice.

In this criminal case, I remind you one last time, the burden is at all times upon the government to prove every element of the crime charged. That burden never shifts to the defendant. This means the defendant has no obligation to prove anything, and so had no obligation to call or cross-examine any witnesses, or to offer any evidence. You and I, as the judges

of the facts and the law, respectively, are presuming the defendant to be innocent, so he has nothing to prove. The government must convince you that the presumption is wrong before you can find otherwise. And the government can only convince you that the presumption is wrong if it proves beyond a reasonable doubt all of the elements of the crimes that are charged in the indictment -- nothing more and nothing less.

So the question that naturally arises is what is a "reasonable doubt"? It is a doubt -- based on reason and common sense -- that would cause a reasonable person to hesitate to act in a matter of importance in his or her own personal life. Proof beyond a reasonable doubt is proof of such convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs.

A doubt is only reasonable if it's based on the evidence, or on a lack of evidence. A doubt is not reasonable if it's based on a caprice, or a whim or on speculation or on sympathy. And a doubt is not something that you dream up as an excuse to avoid the performance of an unpleasant duty.

You will find the facts from one thing and one thing only. You will find them from the evidence in the case.

Now, the evidence in this case consists of the sworn testimony of the witnesses; all of the exhibits that have been received in evidence, regardless of who produced them; and all

facts that have been agreed to or stipulated, and you are to regard those as proved.

Remember, nothing I say to you is evidence. Nothing any of the lawyers has said to you is evidence. Questions by themselves are not evidence. Objections that the lawyers make are not evidence. You have to disregard any evidence to which an objection was sustained by the court, and you have to disregard any evidence that I ordered stricken.

Now, you need to understand that I am neutral in this matter, because I don't get to decide the issues of fact. That is your job, and I leave it to you. I tell my jurors all the time my verdict is your verdict. You will tell me what my verdict is in this case. My function has been to get the trial concluded as fairly and promptly as possible, and to explain the law to you. The decision in the case is yours, so don't get it into your head that I have a certain attitude or view about the case. I do not.

In making your findings based on the evidence that's been received, you are permitted to draw reasonable inferences from the facts that you find have been proved from the evidence, from the testimony and the exhibits. Inferences are simply deductions or conclusions that reason and common sense lead you to draw from all the evidence received in the case.

You should consider the evidence at a trial in the same way that any reasonable and careful person would treat any

important question that involved facts, opinions, and evidence. You are expected to use your good sense in considering and evaluating the evidence in the case only for those purposes for which it has been received and to give the evidence a reasonable and fair construction in light of your common knowledge of the natural tendencies and inclinations of human beings.

Now, there are two types of evidence you may properly consider in deciding whether the defendant is guilty or not guilty.

One type of evidence is called direct evidence. Direct evidence is evidence given by a witness who testifies to what she saw, or heard, or observed, of her own knowledge -- not because somebody else told her -- acquired by virtue of her own senses.

I was standing on the street corner on that day, and suddenly a red Volkswagen Beetle careens around the corner, went off the road, jumped the curb and smashed into a light pole. The witness is telling you what she saw. That's direct evidence.

Circumstantial evidence is evidence that tends to prove a disputed fact by proof of other facts. There is a simple example of circumstantial evidence that is often used in courts. Assume that when you came into the courthouse this morning the sun was shining and it was a nice day, but you

couldn't see outside and you couldn't hear anything outside because this room was hermetically sealed off from the world, and as you sat there, somebody walked in with an umbrella that was dripping wet, and somebody else walked in with a raincoat that was dripping wet. Now, you could not look outside the courtroom to see whether or not it was raining, so you would have no direct evidence of that fact, but on the combination of facts I asked you to assume, it would be reasonable and logical for you to conclude that it has started to rain. That is all there is to circumstantial evidence. You infer from established facts -- a fact that's established by direct evidence -- the existence or the nonexistence of some other fact, on the basis of your reason, experience and common sense.

Now, remember that circumstantial evidence is of no less value than direct evidence, and as a general rule that the law draws no distinction between direct and circumstantial evidence. Both are admissible. But the law requires that before you convict the defendant, you must be satisfied of his guilt beyond a reasonable doubt from all the evidence in the case.

Audio recordings and photographs were admitted into evidence in this case. I instruct you that the recordings and the photographs were made in a lawful manner. No one's rights were violated. So, the government's use of this evidence is entirely lawful. Therefore, you should consider this evidence

when deciding whether the government has proved the defendant's guilt beyond a reasonable doubt -- even if you disapprove of the way the evidence was collected. Consider it the way you would any other evidence. Of course what weight you give to the recordings and photographs, if any weight at all, is completely up to you.

Now, in connection with the recordings, you have been provided with the transcripts of the conversations and those were given to you to assist you while listening to the recording. I instructed you then, and I remind you now, that the transcripts are not evidence. The transcripts were provided only as an aid to you in listening to the tapes. It is for you to decide whether the transcripts correctly present the conversations that were recorded as you heard them.

Now this is only true when the language you hear on the tapes is English. When the language is Spanish, it is the translation into English, as it appears in the transcript, that is the evidence. If you happen to speak Spanish, you may not substitute your own translation for the one that appears in the transcript.

Now, you as the jurors are the sole judges of the credibility, the believability of the witnesses, and of the weight that their testimony deserves. You may be guided by the appearance and conduct of a witness, or by the manner in which the witness testified, or by the character of the testimony

that's given, or by evidence you find to be credible that is contrary to the testimony given.

You should carefully scrutinize all the testimony you have heard, the circumstances under which each witness testified, and every matter in evidence that tends to show whether a witness is worthy of belief. Consider each witness's intelligence, his motive, state of mind, his demeanor while on the stand, his manner. Consider the witness's ability to observe the matters as to which he or she has testified, and whether the witness impresses you as having an accurate recollection of these matters. Consider any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness's testimony is either supported or contradicted by other evidence in the case.

Now, ladies and gentlemen, inconsistencies or discrepancies within the testimony of a witness may cause you to discredit that person's testimony. So may inconsistencies between different witnesses. But inconsistencies do not necessarily indicate that someone is lying. Two or more persons who witness an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. So, in weighing the effect of a discrepancy, please consider whether it pertains to a matter of importance or to an unimportant

detail, and whether you believe it results from innocent error or intentional falsehood.

After making your own judgment, you should give the testimony of each witness such weight, if any, as you may think it deserves.

You heard evidence during the trial that a witness at some earlier time said something that was at least arguably inconsistent with his or her trial testimony.

Statements made by witnesses in the past are not evidence in the case. So why do lawyers ask witnesses if they made specific statements at some point in the past? They do it because, if a witness told a different story in the past, that might help you decide whether to believe his or her trial testimony.

It is for you in the first instance to decide whether the witness' prior statement actually conflicts with his trial testimony. As I told you earlier in the trial when this matter first came up, sometimes lawyers see conflicts where jurors do not. That's one of those many matters of fact that is for you to decide.

But if you decide that there is in fact a conflict between what a witness said in the past and what he told you at trial, you may consider the fact of the inconsistency as you decide whether you believe the testimony the witness gave during the trial. You may not consider the contents of the

allegedly inconsistent statement for the truth of what they assert, or substitute the prior inconsistent statement for the trial testimony even if what the witness said in the past seems more credible to you. The prior statement can never be considered for its truth. Its only relevance lies in assessing whether you believe what the witness said here at trial.

Let me give you a silly example to illustrate the point. Let's assume that the government had to prove beyond a reasonable doubt that the color of a car that was involved in a car crash -- let's assume the government had to prove that. Suppose a witness testified here at trial that the car was blue, and suppose that on cross-examination opposing counsel confronts the witness with a statement he made on an earlier occasion in which he said the same car was gray. Now, you may, if you wish, consider the fact that there is an inconsistency between those two statements -- the fact that the witness said different things at different times -- as bearing on his credibility. You may not, however, decide that the car was gray, because the prior statement is not admitted to prove the truth of the matter asserted. The only evidence before you about the color of the car is that it is blue. That is what the witness said here in court. Either you believe him or you don't.

In making your credibility determination, you may consider whether the witness purposely made a false statement

or whether it was an innocent mistake, whether the inconsistency concerns an important fact, or had to do with a small detail; whether the witness had an explanation for the inconsistency, and whether that explanation appealed to your common sense.

It is your duty, based on all the evidence and your own good judgment, to determine whether the prior statement was in fact inconsistent and, if so, how much, if any, weight to give to the fact of the inconsistency as you decide whether to believe all or part of the witness' trial testimony.

You have heard testimony from people who worked for law enforcement. The fact that a witness is employed by a government agency as a law enforcement official does not mean that his or her testimony is necessarily deserving of either more or less consideration, or that it carries greater or lesser weight than that of any other witness.

You heard testimony from what we call expert witnesses or, as I call them, opinion givers. Dr. Gharibo was called to testify by the government and Dr. Warfield by the defense.

I remind you that experts are witnesses who by education or experience have acquired learning in a science or a specialized area of knowledge. Such witnesses are permitted give their opinions as to relevant matters in which they are qualified experts, and give their reasons for their opinions. Expert testimony is presented to you on the theory that someone

who is experienced in a specialized field can help you to understand the evidence and can help you reach an independent decision on the facts. But an expert is not permitted to tell the jury what conclusion to reach or to substitute his or her judgment for your judgment. Therefore, expert witnesses are not allowed to express legal conclusions or state opinions or inferences as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or a defense thereto. If you perceive that an expert tried to do that, you must disregard that testimony.

Because you are the ultimate judges of the facts, your role in judging the credibility and weight of testimony applies to experts just like every other witness. You should consider the expert opinions that were received into evidence and give them as much or as little weight as you think they deserve. If you decide the opinion of an expert was not based on sufficient education, experience, or data, or if you conclude that the trustworthiness or credibility of an expert is questionable for any reason, or if the opinion of the expert was outweighed, in your judgment, by other evidence in the case, then you might disregard the opinion of the expert entirely or in part.

On the other hand, if you find that the opinion of the expert is based on sufficient data, education and experience, and the other evidence you have seen and heard does not give you reason to doubt the expert's conclusions, you would be

justified in placing reliance on the expert's testimony.

You heard from witnesses who testified they committed crimes. One of those witnesses was used by the government as an informant during the investigation of the case. Both of those witnesses testified that they have entered into "cooperation agreements" with the government.

Now, the government frequently must rely on the testimony of witnesses who admit participating in crimes, and who agree to cooperate with the government in the hope of receiving leniency at sentencing. The government must take its witnesses as it finds them and frequently must use such testimony in criminal prosecution, because otherwise it would be difficult or impossible to detect or prosecute wrongdoers.

Informants are used by the government to obtain leads and to gain introduction to people suspected of violating the law. Because this law enforcement technique is entirely lawful, your personal views on its use -- whether you approve or disapprove -- is beside the point and must not affect your evaluation of the evidence in the case.

Now, you may properly consider the testimony of an informant or a cooperating witness. Indeed, it is the law in federal court that the testimony of a single cooperating witness may be enough in itself for a conviction, as long as you the jury believe that the testimony establishes guilt beyond a reasonable doubt.

But it is also the case that cooperating witness testimony is of such a nature that it must be scrutinized with great care and viewed with particular caution as you decide how much of it you believe. The fact that a witness is cooperating with the government can be considered by you as bearing upon his or her credibility. It does not follow, however, that a person who has admitted participating in crimes is incapable of giving truthful testimony.

As with the testimony of any other witness, a cooperating witness and informant testimony should be given such weight as you think it deserves in light of the facts and circumstances before you, taking into account the witness's demeanor and candor, the strength and accuracy of his recollection, his background, and the extent to which his testimony is or is not corroborated by other evidence in the case.

You heard testimony about the agreement between the government and the cooperating witnesses. Ladies and gentlemen, it's no concern of yours why the government made an agreement with these people. However, the existence of the agreement, and any effect you think it had on the witness's truthfulness, may be considered by you in determining credibility. You may consider whether a cooperating witness who has an agreement with the government has an interest in the outcome of the case, and if so, whether that interest affected

his or her testimony. Your concern is with whether a witness has given truthful testimony here in this courtroom.

In evaluating the testimony of a cooperating witness, you should ask yourselves would that person benefit more by lying or by telling the truth. Was the witness's testimony made up in some way because the witness believed or hoped that he would somehow receive more favorable treatment by testifying falsely? Or did the witness believe that his or her interests would be best served by testifying truthfully? If you believe that a witness was motivated by hopes of personal gain, was the motivation one that would cause the witness to lie, or was it one that would cause him to tell the truth? Did this motivation color the witness's testimony?

If you find that the testimony of the cooperating witness was false, you should reject it. If, however, after a cautious and careful examination of the cooperating witness's testimony, and his demeanor upon the witness stand, if you are satisfied that the witness has told the truth, you should accept it as credible and act upon it accordingly.

If you find that any witness -- any witness -- including a cooperating witness -- has testified falsely as to any material fact, the law permits you to disregard the entire testimony of that witness. If I can put it a little differently, if someone lies to you about a fact that you deem to be important, then you can if you wish throw out that

witness's entire testimony, on the ground that somebody who lied to you about one important thing really can't be trusted in anything. But the issue of credibility need not be decided in an all-or-nothing fashion. You may decide to accept as much of the witness' testimony as you deem to be true and disregard just the parts that you feel are false. How you treat such a witness is entirely up to you.

You heard reference in the arguments -- no. Excuse me, I'm going to take the first sentence out of this.

I want to caution you, ladies and gentlemen, there is no legal requirement that the government prove its case through any particular means. While you are to carefully consider the evidence that's been adduced by the government, you are not to speculate as to why the government used the techniques it used or why it didn't use other techniques. The government is not on trial, and law enforcement techniques are not your concern.

Your concern is to determine whether or not, on the evidence or the lack of evidence, the guilt of the defendant has been proved beyond a reasonable doubt.

You may not draw any inference, favorable or unfavorable, toward the government or toward the defendant from the fact that any person other than the defendant is not on trial here. You may not speculate about the reasons why other people are not on trial. Those matters are wholly outside your concern; they have no bearing on your function as jurors.

Dr. Mirilishvili did not testify in this case. Under our Constitution, a defendant has no obligation to testify or to present any evidence, because it is the government's burden to prove the defendant guilty beyond a reasonable doubt. That burden remained with the government throughout the entire trial and has never shifted to the defendant. A defendant is never required to prove that he is innocent.

You may not attach any significance whatever to the fact that the defendant did not testify. No adverse inference against him may be drawn by you because he did not take the witness stand. In fact, you may not consider this against the defendant in any way in your deliberations in the jury room.

In reaching your decision about whether the government has sustained its burden of proof, I remind you that it would be improper for you to consider any personal feelings that you have about the defendant's race, religion, national origin, sex or age.

It would be equally improper for you to allow any feeling you might have about the nature of the crimes charged to interfere with your decision-making process.

Any sort of bias, prejudice or sympathy for or against either side, has no relevance to the matter before you and may not be considered by you in reaching a verdict.

Finally, the question of possible punishment is no concern of yours, and it should not enter into or influence

your deliberations. You haven't heard anything about punishment and that's for a reason. The duty of imposing sentence rests exclusively with me, the court. Your function is to weigh the evidence in the case and to determine whether the defendant has been proved guilty beyond a reasonable doubt, solely on the basis of that evidence.

Conveniently, it is five minutes until one. I say conveniently because I have finished the first part of the charge, and I'm about to turn to a summary of the charges against the doctor. It's a perfect time to break for lunch. I will be back on this bench at 2:15, and you will be ready to go. Don't discuss the case; keep an open mind.

(Jury not present)

THE COURT: Have some lunch. I should put one other thing on the record, and then I want it see you guys for one second back in the back.

As I said briefly, the motion for prosecutorial misconduct is denied. The government has comported itself in full consistency with the highest and best traditions of its office throughout this trial, and there was in my view absolutely no deliberate effort made by Mr. Diskant to go beyond the evidence in this case.

The government had a perfectly logical rationale for what he said, that as I pointed out was technically correct. The government at no point did anything any worse than

Mr. Mazurek did when he put up that chart that I said Dr. Warfield couldn't testify about during the course of his summation.

I think everyone has done a brilliant job trying this case. I think that the closing arguments, all three of them, were simply phenomenally good. The best thing that can happen for me during one of these trials is I can go away from it thinking that I've had a good and challenging professional experience. That doesn't happen all the time; it has definitely happened in this case. And I want to put that on the record. You guys just meet me at side bar for a second.

(Continued on next page)

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AFTERNOON SESSION

2:15 p.m.

(Jury not present)

MS. CUCINELLA: Your Honor, we have one issue.

THE COURT: Have a seat.

MS. CUCINELLA: It's not an actual issue. We realized we had not allocuted the defendant on his decision not to testify, and we -- both parties -- would like to put it on the record, if the court is so willing.

THE COURT: I am fine about doing that.

Dr. Mirilishvili?

THE DEFENDANT: Yes, your Honor.

THE COURT: Good afternoon, sir.

THE DEFENDANT: Good afternoon to you.

THE COURT: You have heard me say repeatedly over the past few weeks that the government has the entire burden of proof in this case, that you have no burden to prove that you are innocent. And I have told the jury that you have no obligation to testify in this case and that they can't draw any negative conclusions about you if you don't.

By the same token, you have an absolute right if you in your best judgment believe you should testify, to get on the witness stand and to tell your side of the story and to subject yourself to cross-examination from the government.

There are only two decisions that are not really

remitted to Mr. Mazurek and the defense team, and one of them is the decision about whether or not you will testify. So, it was my understanding from Mr. Mazurek that you did not in fact wish to testify, and I want to confirm that that is indeed your decision. Is that your decision?

THE DEFENDANT: A hundred percent, your Honor.

THE COURT: Made voluntarily and of your own free will, sir?

THE DEFENDANT: Yes, ma'am.

THE COURT: And you understand that I will stop everything and let you get on the stand if you want to do so?

THE DEFENDANT: I understood, ma'am.

THE COURT: Thank you, Dr. Mirilishvili.

THE DEFENDANT: You're quite welcome.

(Continued on next page)

(Jury present)

THE COURT: OK. I hope you had a good lunch. Let's get back to it. Have a seat.

Now, there are three counts, or charges, that you must consider, and you must consider each count separately, and you must return a separate verdict of guilty or not guilty for each count.

Count One alleges that Dr. Mirilishvili conspired with others to distribute a controlled substance in violation of the law. The controlled substance is oxycodone.

Counts Two and Three charge Dr. Mirilishvili with illegal distributing a controlled substance (oxycodone) to certain individuals on certain dates. Count Two relates to January 10, 2013 and Count Three relates to October 28, 2014.

Now, I'm going to charge you on the substantive law that relates to distribution of a controlled substance first, because you need to understand that law before you can consider whether the defendant "conspired" or agreed with others, to violate that law. So I'm go to charge you on Counts Two and Three and then on Count One, in that order.

The first element that the government must prove beyond a reasonable doubt in order to convict the defendant on Counts Two and Three is that the defendant, Moshe Mirilishvili, actually distributed controlled substances:

To "distribute a controlled substance" means to

transfer a controlled substance to another person. A licensed medical doctor who provides another person with a prescription for a controlled substance to be filled at a pharmacy has "distributed" the controlled substance within the meaning of the law.

Oxycodone is a controlled substance.

The second element the government must prove beyond a reasonable doubt is that, when Dr. Mirilishvili prescribed the oxycodone, he did so knowingly and intentionally.

An act is done "knowingly" and "intentionally" if it's done deliberately and purposefully; that is, the defendant's actions must have been his conscious objective rather than the product of a mistake or accident or mere negligence or some other innocent reason.

Now, ascertaining whether a person acted knowingly and intentionally involves discerning that person's state of mind. Science has not yet invented a way for us to look inside someone's head to see what he is thinking and intending and knowing. Direct proof of knowledge and intent is rarely available. But direct proof is not required. Knowledge and intent, while subjective, may be established by circumstantial evidence, based on a person's outward manifestations, words, conduct, and acts, that taken in light of all of the surrounding circumstances that are disclosed by the evidence, together with the rational or logical inferences that may be

drawn therefrom. You should use your common sense when drawing inferences from the circumstantial evidence.

The one thing I will not do during this charge is regurgitate to you the arguments that have been made by counsel. You have heard them; they were quite clear; you may consider them.

The law also allows you to find that the defendant had knowledge of a fact when the defendant shows that he was aware of a high probability of the fact but intentionally avoided confirming the fact.

Can I see counsel over here for a second.

(Continued on next page)

(At the side bar)

THE COURT: This always happens, but when we are talking about knowledge, he actually wrote a prescription for oxycodone knowingly, there is no contention here he didn't know that he wasn't writing ago I prescription for -- that he thought he was writing a prescription for something else, is there?

Aren't we talking about actual knowledge in connection with this element, the second element?

MR. DISKANT: I don't believe so, your Honor. I believe that you are instructing them on conscious avoidance with respect to Counts Two and Counts Three.

THE COURT: Correct.

MR. DISKANT: And I think the charge --

THE COURT: No, no. When he prescribed the oxycodone he did so knowingly and intentionally. He prescribed oxycodone knowing he was writing a prescription for oxycodone. That was his intention to write a prescription for oxycodone, right?

MR. DISKANT: Right.

THE COURT: Is there any conscious avoidance about that at all?

MR. DISKANT: No.

THE COURT: No, right, this is in the wrong place.

MR. MAZUREK: We have no objection.

THE COURT: OK.

(In open court)

THE COURT: Ladies and gentlemen, I made an editing mistake; I put something on page 24 and it belongs on a later page. So, let me go back and say:

An act is done "knowingly" and "intentionally" if it is done deliberately and purposefully; that is, the defendant's actions must have been his conscious objective rather than the product of a mistake or accident or mere negligence or some other innocent reason.

All right. Now I'm going to go to the third element.

The third element that the government must prove beyond a reasonable doubt in connection with Counts Two and Three, is that when Dr. Mirilishvili prescribed the oxycodone as charged in Counts Two and Three, he did so other than for a legitimate medical purpose, other than, other than in good faith, and outside the usual course of medical practice.

It is not enough for you to find that the doctor knowingly and intentionally wrote the prescriptions that are the subject of these two counts. Under the law, a doctor who is licensed to prescribed controlled substances cannot be convicted of illegal distribution of controlled substances if he issued the prescriptions in good faith and in the regular course of a legitimate professional practice. The government must prove beyond a reasonable doubt that the doctor acted outside the usual course of medical practice, that he acted

other than in good faith, and without a legitimate medical purpose when he wrote the prescriptions that are the subject of the indictment. And, as I said, and it must proffer that he did so knowingly and intentionally. This is a knowing and intentional. He must have known and intended that it should be other than for a legitimate medical purpose, other than in good faith and outside the usual course of medical practice.

In deciding whether Dr. Mirilishvili acted without a legitimate medical purpose, you should examine the doctor's actions and all the evidence about the circumstances surrounding them.

You must remember this is not a medical malpractice case. It is not enough for the government to prove any degree of negligence, malpractice, carelessness or sloppiness on Dr. Mirilishvili's part. You cannot convict the defendant if all the government proves is that he is an inferior doctor, or that he was running a medical office that was not a "center of excellence," to use a term that you heard during the testimony. What the government must prove beyond a reasonable doubt is that, when the doctor wrote the prescriptions that are the subject of the indictment, he was effectively not acting as a doctor -- he was not writing those prescriptions for a legitimate medical purpose but was instead writing them outside the usual course of professional practice. In order to meet its burden of proof as to this element, the government must

prove beyond a reasonable doubt that the doctor effectively ceased to act in good faith as a medical professional, but instead knowingly and intentionally acted outside of the usual course of professional practice, and not for a legitimate medical purpose.

I already told you that the government must prove beyond a reasonable doubt that Dr. Mirilishvili prescribed oxycodone knowingly and intentionally, and I explained to you what those terms mean. The same definition of knowingly and intentionally applies in connection with the third element. That is, the government must prove beyond a reasonable doubt that the doctor knew that he was acting outside the usual course of medical practice, and not for a legitimate medical purpose, and that it was his purpose and objective, his intention, to act in this manner. If all the government proves is that the doctor was negligent, or made a mistake, or accidentally acted outside of the usual course of medical practice, you cannot find him guilty of violating the Controlled Substances Act.

Now, the government can prove knowledge in two different ways. It can prove that Dr. Mirilishvili had actual knowledge that he was acting outside the usual course of medical practice and not for a legitimate purpose, or -- and this is with respect to the third element -- or it can prove that he consciously disregarded knowing a fact of which he was

aware there was a high probability. This is where I put the thing in the wrong place.

As an alternative to actual knowledge the law allows you to find that the defendant had knowledge of a fact when the evidence shows that he was aware of a high probability of that fact but intentionally avoided confirming the fact. The law calls this "conscious avoidance" or "willful blindness."

In determining whether the government has proven beyond a reasonable doubt that the defendant knowingly acted outside the usual course of professional practice and not for a legitimate medical purpose, you may consider whether he deliberately closed his eyes to what would otherwise have been obvious to him. A person cannot willfully and intentionally remain ignorant of a fact that's important to his conduct in order to escape the consequences of the criminal law.

Accordingly, if you find beyond a reasonable doubt that the defendant acted with the conscious purpose to avoid learning some relevant fact, then you may treat the defendant as though he actually knew the fact existed. However, guilty knowledge may not be established by demonstrating that the defendant was merely negligent, foolish, or mistaken, and you may not rely on willful blindness as the basis for treating the defendant as though he was aware of the existence of a fact if you find that the defendant actually believed that the fact did not exist.

It is entirely up to you to decide whether the defendant deliberately closed his eyes to a fact that he should have known existed and to draw any inferences that are to be drawn from the evidence on this issue.

Now, I have one more very important thing to explain to you. As part of its proof of this element, the government must prove beyond a reasonable doubt that Dr. Mirilishvili did not act in good faith when he prescribed the oxycodone to the people who came to see him.

A doctor acts in good faith when he exercises his professional judgment about a patient's medical needs in accordance with the standard of medical practice as generally recognized and accepted in the United States. It means that the doctor acted in accord with what he reasonably believed should be proper medical practice.

If you find that Dr. Mirilishvili acted in good faith in distributing the drugs that are the subject of either or both of Counts Two and Three, then you must find him not guilty on that count.

If, however, the government proves beyond a reasonable doubt that the defendant did not act in good faith, as I have defined that term for you, and for a legitimate medical purpose when distributing the drugs that are the subject of either or both of Counts Two and Three, but instead distributed them outside the usual course of medical practice, then you may

conclude that the government has satisfied its burden with respect to the third element.

Now, I want to say one thing. Your verdict on Count Two does not dictate your verdict on Count Three, and vice versa. When I say you have to consider these counts separately and independently, I mean it. Consider the evidence that relates to Count Two, which talks about a particular date, and you reach a verdict on that, and then you start all over again clean slate, and you consider the evidence that relates to Count Three which charges a different particular date.

In order to convict the defendant under either count, or both of them, all 12 jurors have to agree beyond a reasonable doubt precisely which prescription or prescriptions the defendant wrote for other than a legitimate medical purpose and outside the usual scope of a professional medical practice.

For example, let's say, when considering Count Three, six of you thought that Dr. Mirilishvili did not have a good faith medical reason for writing an oxycodone prescription for Mary Smith but he did have a good faith medical reason for writing an oxycodone prescription for Robert Jones -- I picked names that aren't in the case -- and the other six of you thought that the defendant had a good faith medical reason for writing an oxycodone prescription for Mary Smith but did not have a good faith medical reason for writing a prescription for Robert Jones. In that circumstance, you would not be unanimous

for the purpose of returning a verdict -- even though all 12 of you thought that the doctor had written at least one prescription that was not for a legitimate medical reason and outside the scope of his practice. You have to agree on what prescription it was, who it was for.

OK. I now turn back to Count One, which charges the defendant with a drug conspiracy.

A conspiracy is an agreement between two or more people to accomplish some unlawful purpose. Conspiracy is an entirely separate crime from the underlying substantive offense.

The ultimate success of a conspiracy, and the actual commission of the crimes that are the objects of the conspiracy, are not relevant to the question of whether a conspiracy existed. You may find a defendant guilty of the crime of conspiracy even if you find that the substantive crime that was the object of the conspiracy was never actually committed.

The first element the government must prove beyond a reasonable doubt in order to prevail on Count One is that the conspiracy charged in the indictment existed. The charged conspiracy is a conspiracy to distribute oxycodone. That's the object of the conspiracy, the distribution of oxycodone.

In order to show that such a conspiracy existed, the evidence must show that two or more people, in some way or in

some manner, either explicitly or implicitly, came to an understanding to violate the law and to accomplish an unlawful plan -- in this case, a plan to distribute oxycodone.

Now, to prove the existence of a conspiracy, the government is not required to show that two or more people sat around a table and entered into a solemn pact, orally or in writing, stating that they formed a conspiracy, an agreement to violate the law and spelling out all the details. It is rare that a conspiracy can be proven by direct evidence of an explicit agreement. Common sense tells you that when people agree to enter into a criminal conspiracy, much may be left to unexpressed understanding.

So, in determining whether the unlawful agreement alleged in Count One existed, you may consider the actions of all the alleged coconspirators that were taken to carry out the apparent criminal purpose. The old adage, "actions speak louder than words," applies here. Often, the only evidence that is available with respect to the existence of a conspiracy is that of disconnected acts on the part of the alleged individual coconspirators. But when taken together and considered as a whole, that conduct may warrant the inference that a conspiracy existed just as conclusively as more direct proof, such as evidence of an express agreement.

So, in considering whether a conspiracy existed, and not just a conspiracy, but the charged conspiracy, you should

consider all the evidence that has been admitted about the conduct and statements of each alleged coconspirator, as well as inferences that may reasonably be drawn from that conduct and from those statements. It is sufficient to establish the existence of the conspiracy, if, from the proof of all the relevant facts and circumstances, you find beyond a reasonable doubt that the minds of at least two alleged coconspirators met in an understanding way, to accomplish the objective of the conspiracy that's charged in Count One.

The object of a conspiracy is the illegal goal that the coconspirators agreed or hoped to achieve. The object of the charged conspiracy here was the distribution of oxycodone.

I have already described for you the term "distribution" during my instructions on Counts Two and Three. That instruction applies equally here as it relates to Count One.

In deciding whether the government has proved beyond a reasonable doubt that the defendant knew that the object of the conspiracy was the distribution of oxycodone using prescriptions that were written outside the usual course of a medical practice and that were not written for a legitimate medical purpose, you may consider whether the defendant deliberately closed his eyes to what would otherwise have been obvious. In other words, this is another instance where the government can prove either that the defendant actually knew

the objective of the conspiracy or he consciously avoided knowledge of the object of the conspiracy.

If the government proves beyond a reasonable doubt that the defendant was aware that there was a high probability that other people were referring patients to him who were not really in need of his services, and were then taking prescriptions written by him for these patients and selling the oxycodone prescribed thereby on the street, and the defendant continued to write prescriptions while deliberately and consciously avoiding confirming that act, you may treat his deliberate avoidance of positive knowledge as the equivalent of actual knowledge. However, if the defendant actually believed that he was writing prescriptions for real people who needed medication, then you cannot find that he was consciously avoiding knowledge of the object of the conspiracy.

Similarly, if all the government proves is that the defendant was negligent, careless or foolish, it has not proven conscious avoidance.

Please note that the concept of conscious avoidance cannot be used as a basis for finding that the defendant knowingly joined the conspiracy. It is logically impossible for someone to join a conspiracy through conscious avoidance.

If, however, you find beyond a reasonable doubt that the charged conspiracy existed, and that the defendant became a member of the conspiracy, then the government can prove that

the defendant acted with knowledge of the illegal objectives of the conspiracy either by proving that the defendant actually knew what the purpose of the conspiracy was; or by proving that the defendant deliberately closed his eyes to what otherwise should have been obvious to him.

If you conclude that the government has proven beyond a reasonable doubt that the conspiracy charged in Count One existed, you must determine whether it has proved that the defendant participated in the conspiracy with knowledge of its unlawful purposes and in furtherance of its objectives.

In this regard, what the government must prove beyond a reasonable doubt is that the defendant unlawfully, intentionally, and knowingly entered into the conspiracy; that he did so with criminal intent -- that is, with a purpose to violate the law; and that he agreed to take part in the conspiracy in order to promote and cooperate in one of its unlawful objectives.

The term "unlawfully" simply means it's contrary to law. The government need not prove that the defendant knew he was breaking any particular law or any particular rule. The government must only show that the defendant was generally aware of the unlawful nature of his acts.

The defendant must have joined a conspiracy with knowledge that he was doing so. In this context, I remind you again conscious avoidance is not a substitute for actual

knowledge. Now, as I mentioned earlier in my instructions, you remember that science has not yet devised a manner of looking into a person's mind and knowing what a person's thinking. I wish they would have invented that machine, but they haven't done it. However, you have before you the evidence of certain acts, conversations, and statements that are alleged to involve the defendant and others. And the lawyers made those arguments, so I'm not going to make them again.

The government contends that these acts, conversations, and statements show, beyond a reasonable doubt, that the defendant knew of the unlawful purpose of the conspiracy and that he agreed to enter into it in furtherance of its purposes.

It is not necessary for the government to show that the defendant was fully aware of every detail of the conspiracy in order for you to conclude that the government has proved guilty knowledge on his part. Nor is it necessary for the defendant to know every other member of the conspiracy. A defendant may know only one other member of a conspiracy and still be a coconspirator with many people.

(Continued on next page)

THE COURT: The duration and extent of a defendant's participation has no bearing on the issue of the defendant's guilt. He need not have joined the conspiracy at its outset. He may have joined it at any time in its progress: At the beginning, in the middle, or at the end. But from the moment he joins, he becomes responsible for everything that was done before he joined and everything that he's done during the conspiracy's existence as long as he was a member.

Each member of the conspiracy may perform separate and distinct acts. Some conspirators can play major roles, while others play minor roles. An equal role is not what the law requires. In fact, even a single act may be sufficient to draw a defendant within the scope of a conspiracy.

I want to caution you, the defendant's mere association with a member of a conspiracy does not make him a member of that conspiracy, even if the defendant knew that the other people were involved in a conspiracy. In other words, knowing about a conspiracy, without agreeing to participate in it, is not sufficient. By the same token, the defendant's mere presence at the scene of criminal activity does not make him a participant in that activity. What is necessary is that the defendant participated in the conspiracy with knowledge of its unlawful purposes, and with the intent, the conscious purpose or objective, to aid in the accomplishment of its unlawful objectives.

A conspiracy, once formed, is presumed to continue until either its objective is accomplished or there is some affirmative act of termination by the members. Once a person is found to be a member of a conspiracy, he is presumed to continue his membership in the venture until its termination. Also it is shown by some affirmative proof that he withdrew and disassociated himself from it at some earlier time.

Ladies and gentlemen, the indictment charges that the conspiracy, that's the subject of Count One, existed in or about from on or about January 2012 through on or about December of 2014.

It is not essential that the government prove that the conspiracy charged in Count One started and ended on the exact date set forth in the indictment. It is sufficient if you find that in fact a conspiracy was formed and that it existed for some of the time within the period set forth in the indictment.

The instruction on good faith that I gave you in connection with Counts Two and Three applies here. Even if you conclude that the defendant was distributing oxycodone in connection with the Count One conspiracy, the government must prove beyond a reasonable doubt that the defendant was not acting in good faith when he did so.

In addition to all the elements that I've just told you for Counts One, Two, and Three -- by the way, Count One gets considered separately from Counts Two and Three. Your

verdict on one count does not dictate your verdict on another count. You really do have to deliberate on each count, separately and independently.

As to each of the three counts, in addition to the other elements I have described for you, you have to decide whether any act in furtherance of the commission of the crime occurred within the Southern District of New York. The Southern District of New York includes Manhattan, the Bronx, Westchester, Rockland, Putnam, Dutchess, orange, and Sullivan Counties. This means that with regard to each count you must decide whether the charged crime or any lawful or unlawful act that was committed to further or promote the charged crime occurred within the Southern District of New York.

Now, I have made a big deal throughout this trial about the words beyond a reasonable doubt. Not only have I emphasized that the government has the burden and the entire burden and the eternal burden of overcoming the presumption of innocence, but I have said it can only do that if it convinces you of every element of the charged crime beyond a reasonable doubt, except that as to venue, as to this requirement that something have happened in the Southern District of New York, the government only needs to prove it by a preponderance of the evidence. The government has satisfied its obligation as to venue if it proves by a standard of essentially it's more likely than not that the crime occurred in the Southern

District of New York or that some act in furtherance of the crime occurred in the Southern District of New York. Now, if the government fails to prove venue as to any count, you have to acquit the defendant on that count.

The government offered evidence about the defendant's tax returns. Let me remind you that the defendant is not on trial for committing any acts that are not in the indictment, so you can't consider evidence regarding the defendant's tax returns as evidence of some crime that's not charged in the indictment. And the tax returns were admitted for a much more limited purpose and you may consider them for that limited purpose only. You may but are not required to draw an inference from the evidence regarding the tax returns, that the defendant acted knowingly and intentionally in connection with the crimes he is charged with in the indictment. That's the purpose for which the tax returns were admitted. The evidence may not be considered by you for any other purpose. Specifically, you cannot consider any evidence about taxes as proof that the defendant had a criminal personality or he had a bad character. It is offered for one reason and one reason only. I have told you what that purpose was. And you certainly cannot use that evidence to conclude that he must have committed the crimes charged in the indictment.

You will note that the indictment alleges that certain acts occurred on or about various dates. It does not matter if

the evidence you heard at trial indicates that a particular act occurred on a different date, as long as there is substantial similarity between the dates alleged in the indictment and the dates established by the evidence. What is substantially similar? You tell me what you think it is. Do you think they are substantially similar.

Ladies and gentlemen, the verdict must represent the considered judgment of all 12 deliberating jurors. In order to return a verdict it is necessary that you all agree with each other. Your verdict must be unanimous, unanimous on each count.

With respect to Counts Two and Three, I told you you had to be unanimous with respect to whatever prescription you think the defendant issued in violation of the law if you reach the conclusion that the government has met its burden with respect to that count.

How do you get to unanimity. It is your duty as jurors to consult with each other and to deliberate, to deliberate with a view toward reaching an agreement as long as you can do that without violating your individual conscience. What does it mean to deliberate? A deliberating juror does two things. A deliberating juror is a juror who shares his or her opinions about what the evidence shows with the other people in the room. A deliberating juror is one who will sit back and listen to what everybody else who is sitting around the table

thinks the evidence shows and will weigh and consider those views, will consider them with an open mind, a mind that's capable of being changed.

I tell this story at every trial. I have rarely had serious problems with the jury. But once many, many, years ago, when I was a very young judge, we had a juror who went back into the jury room and listened to the evidence. He listened to the charge. He said he could be fair. In voir dire he said he would follow the judge's instructions. He walked back in and he said, this is the verdict. The people said: No. We want to talk about the evidence. No. He says: This is the verdict. My way or the highway. I'll never change my mind. I don't care what you people say. Eventually, after not a very long period of time, he showed his contempt for the whole process by pulling out his Wall Street Journal from his briefcase and turning his chair to the wall -- I heard this later. I wasn't in the room obviously -- turning his chair to the wall, opening the newspaper and refusing to be a part of the conversation. Guess what, ladies and gentlemen? That jury did not return a verdict. And it did not return a verdict because somebody wasn't willing to deliberate, to share his views and to consider the views of the other people in the room, to test your own views against the views of the other people in the room. That's what a deliberating juror does.

In the end each of you has to decide the case for

yourself, but you can only do that after you impartially consider the evidence in the case in light of the views of your fellow jurors. So during the course of your deliberations don't hesitate to re-examine your own views and change your opinion if the other jurors can convince you that your original view of the evidence is maybe not the right view. By the same token, do not surrender your honest conviction as to the weight or the effect of the evidence just because the other jurors want you to or merely for the purpose of returning a verdict.

Remember, ladies and gentlemen, at all times you are not partisans in this process. You are judges. You are the judges of the facts. When you go back to the jury room the first thing you should do is elect somebody to be your foreperson. Those of you who have been in state court, they always give that to juror no. 1, but we will let you pick your own foreperson. Juror no. 1 generally tends to be more grateful for that. The foreperson is no more important than any of the rest of you, and the foreperson's views are not any more important than the views of the rest of you, and the foreperson's vote counts for exactly as much as the votes of the rest of you. We need somebody back in the jury room who will preside over your deliberations, organize things back there, speak up for you here in court, perform some little administrative tasks. It's really an administrative position. And you pick whoever you think you want to occupy that role.

If it becomes necessary for you to communicate with me during your deliberations, here how it works. You send me a note. The note should be signed by the foreperson. If the foreperson goes on strike, it's happened to me twice in 18 years, if the foreperson goes on strike and refuses to sign the note, for whatever reason, some other juror can sign the note. It needs to be signed. And ask the question. I'll answer it and we will talk a little bit about how I'll answer it in a minute. Never try to communicate with me during these deliberations by any means other than a signed writing. Don't tell Jim something, ok, so he can give me a message. Don't do that. Don't tell the court security officer who will be up here in a little bit.

If you see me in the elevator lobby -- I have really tried to hide from you, but if you have seen me in the elevator lobby, don't try to corral me. By note. And I will never communicate with any members of the jury on any subject, including subjects touching on the merits of the case, except in writing or orally here in open court with all of the people who are sitting in the well sitting in their accustomed positions.

Now, your superintendent here is Jim. I am going to administer an oath to him, like the oath you took at the beginning. And you will note from his oath that he is not allowed to talk to you about anything touching on this case

while you are deliberating.

(Court deputy sworn)

THE COURT: Now, when you send me a note, if you send me a note, don't tell me what the vote is. Do not send a note that says: We are 7 to 5 for acquittal on Count Two and we would like you to explain the difference between this and that. I'm not supposed to know. I'm not supposed to know about the vote until the vote is 12 to nothing. And it can actually screw things up if you tell me too soon. Don't tell me what the vote is, please, when you write me a note.

Now, most of the time when jurors write notes they want to hear some testimony again. If it should happen in your deliberations that you want to review the testimony of a witness, that can be done. You should send out a note that says what you want to hear. And the more precise you can be, the better. If you know, for example, that you want to hear the testimony about Mr. Smith about the hour when the clock stopped and you want to hear the cross-examination, tell us that, be as detailed as you can, and we will find what you want. I urge you not to ask for testimony unless you talk among yourselves and exhaust your total memory because the collective memory of 12 people is generally better than that of any one of you. If after discussing the matter you are still in doubt about a particular point in the testimony and you want to review it, I will have the court reporter gather that

testimony for you. It will almost always happen that you will want to hear testimony or read testimony because we can now send it back. We now have the ability, thanks to computers, we now have the ability to actually instead of making you sit here and listen to it, we actually have the ability to give it to you, to hand it to you.

You will probably want it just as we are about to go to lunch, when somebody has been called away to do something else. That's just the way it always works. And when you ask for testimony, the lawyers go through it with the court reporter, they see if they can agree. If they can't agree, I have to come out and make rules, and then we have to prepare it for you. It's not a super time-consuming process, but it's generally not a note we can answer in 10 minutes. If you ask for testimony, move on to another subject. Know that it is our highest priority and that we will be getting it together for you as fast as humanly possible. Then the lawyers and I may decide to have you come out and here read back or we may send you back a portion of the transcript. I found that the jurors like the latter.

You will have all of the exhibits with you admitted into evidence with you in the jury room. I think you can assume if you don't have it in the jury room, it was not an exhibit that was admitted into evidence. And you should just know that I can't send back things that aren't admitted into

evidence.

You will have a copy of the charge back in the jury room and you are free to review it, but I want you to understand, I have nothing better to do until you reach a verdict than to give you whatever help I can. If you are confused about something in the charge, and I'll grant you that since I found that I put something on the wrong page, you won't have that. You'll have it corrected. But since I found I put something on the wrong page, you might have been confused. I don't know. You can ask me to clarify it. And you should ask me to clarify it. And if you have a specific question that arises about the law in the context of your deliberations, you can ask the question and I'll talk about it with the lawyers and I'll do my best to clarify. I've been known to do it better the second time around, I really have. Don't assume that you can't ask me to go over the instructions just because I'm sending them back with you. You can ask and I will comply.

When you retire to begin your deliberations, you are going to be provided with a verdict sheet and the verdict sheet is basically going to say, how do you find the defendant on Count One, and it will tell you what Count One is. And how do you find the defendant on Count Two, and it will tell you what Count Two is. How do you find the defendant on Count Three, and it will tell you what Count Three is. Guilty or not guilty, checkmark. As you reach a verdict, check off guilty or

not guilty and move on to the next count that you have to consider.

By the way, you don't have to consider them in the order that they are written on the piece of paper. You can consider them in any way order you want. But by the end of the day you should have a checkmark under item 1, under item 2, and under item 3. It should be either guilty or not guilty. And when you have that, a verdict sheet that says that, you should send me one more note and the note should say, we have reached a verdict. That's all it should say, we have reached a verdict. I'll bring you back into the courtroom, we will take the verdict right here.

Now, I need to talk for a moment with the lawyers.

(Continued on next page)

(At the side bar)

THE COURT: Start with, all of the objections from the defense that were the subject of our discussion over the last few days are preserved for appeal.

MR. MAZUREK: Yes.

THE COURT: From the government first.

MR. DISKANT: I have no objections, your Honor.

THE COURT: From the defendant.

MR. MAZUREK: Judge, page 26. In my hearing, in the written version I have in the first line after, this is not a medical malpractice case, this is a criminal case, I don't remember hearing you say that.

THE COURT: I thought I said it.

MS. CUCINELLA: I thought you said it several times.

THE COURT: I think I said it.

MR. MAZUREK: I may have missed it.

THE COURT: I can't imagine why you wanted me to say those words.

MR. MAZUREK: Then page 28, this was confusing to me as is read and written here. The defendant did not act in good faith, as I have defined that term for you, and then it says in my written version, and for a legitimate medical purpose. I think we need another not. There is a double negative.

THE COURT: If the government proves that the defendant did not act in good faith.

MR. MAZUREK: And not act for legitimate medical purpose.

THE COURT: You are absolutely right. And that he did not act.

MR. MAZUREK: That's confusing.

THE COURT: It's a little confusing.

MR. MAZUREK: Then on page 33, second line. The object of the charged conspiracy here. It says the distribution of oxycodone. I think because of the nature of this case it has to be the unlawful distribution of oxycodone, only because he has a license.

THE COURT: I know that. But I've already said that. I'll do something there.

MR. MAZUREK: I don't know if we mentioned this before, but on page 39, conscious avoidance is repeated a number of times here. In the charge it might be helpful to the jury to hear about good faith again.

THE COURT: I charged this. I read this. I said the instruction on good faith.

MR. MAZUREK: It just refers back --

THE COURT: Please. No.

MR. MAZUREK: On my version on page 41 has different language. It may have been changed.

THE COURT: I want the whole thing printed out because you may not consider other statements. I changed it because it

was totally appropriate.

MR. MAZUREK: It needs to be changed.

THE COURT: We will. We are going to get the transcript and what I said is going.

MR. GOSNELL: Your Honor, on page 37, the exhibits to the jury room, it's my understanding from talking with the government that the actual recordings are not going back to the jury room.

THE COURT: They usually do.

MR. DISKANT: We defer to the Court.

MR. GOSNELL: If they are actually going back then, I think the only thing that we need to also provide then is kind of a key to the jury because there are large portions of the recordings that have nothing to do --

THE COURT: I'll tell you what. If they want to listen to the recordings, I'll bring them out here. I'll tell them that.

MR. GOSNELL: That was my only point.

(Continued on next page)

(In open court)

THE COURT: Based on my chat with the lawyers, let me tell you a couple of other things. With respect to Counts Two and Three, I think I left out a not. You know we talked about good faith, that one of the things that the government must prove in connection with Counts Two and Three is that -- this is the problem. The government must prove a negative. The government must prove that the doctor did not act in good faith and that he did not act for a legitimate medical purpose and that his actions were outside, therefore not within the usual course of medical practice. I trip over these things.

Only if the government proves beyond a reasonable doubt that the defendant did not act in good faith, as I've defined that term for you, and that he did not act for a legitimate medical purpose when distributing the drugs that are the subject of either or both Counts Two and Three, but instead distributed them outside the usual course of medical practice, only then may you conclude that the government has satisfied its burden with respect to the third element. Great. That is the one substantive correction.

The parties have asked me to tell you that if you want to listen to any of the tapes, we are going to bring you out into the courtroom to do that instead of sending a tape recorder back with you because the way they are cataloged, there is a whole lot of stuff on those tapes that have nothing

to do with this case. I am not sure why, but I'm not the person who made them. We will bring you out here if you want to listen to the tapes.

A couple of last-second notes. Please deliberate only when you are all together in the jury room. If someone is in the restroom, if someone is taking a smoking break, I hope nobody of you is doing that, but if somebody is taking a smoking break, if someone is out of the room for any reason, before everybody gets here in the morning, don't deliberate. The reason is, you just never know when someone is going to say the thing that will cause the penny drop for everybody. That's the moment. You all need to be together when deliberating.

There is no smoking in my jury room. If anybody smokes, I will never ask. If anybody smokes, you will knock on the door and either Jim or the court security officer will arrange for a smoking break.

The one thing I beg of you, if you need to get away from each other for a while, we will do that, too, but don't take it upon yourselves to leave the jury room by the other door. Don't do that. It only happened once. It was one of the worst days of my life. It was like the ants had gotten out of the ant farm, and I had no idea where my jury was. We were looking all over the courthouse. It turned out that they just needed a break from each other. We get that and we will take care of that for you. We will do that for you. Just don't do

it for yourself.

Could I ask the two remaining alternate jurors if you'll go back into the jury room with Jim and get your stuff.

JUROR: Can I ask a question.

THE COURT: A note, please. I'm sorry.

JUROR: It's ok. I'm just testing.

THE COURT: Ladies and gentlemen, you are free to retire and to deliberate in this case. You may discuss the case. It's time to start making up your mind.

(At 3:16 p.m., the jury retired to deliberate)

THE COURT: The last thing on the rolling basis is going to be the charge. I am going to get the transcript of the charge so we are absolutely sure that everything goes back depending on what kind of shape it's in, we may photocopy that or we may make changes here.

Have you all got a set of exhibits that's a clean set ready to go?

MR. DISKANT: Yes.

MS. CUCINELLA: Yes, your Honor.

THE COURT: Is the verdict sheet here? I am going to pass this out. I need that initialed by counsel for both sides or you can object to it. It's a pretty plain, vanilla verdict sheet.

THE DEPUTY CLERK: The parties agree that these are all the exhibits. Defense.

MS. CUCINELLA: Yes.

MR. GOSNELL: Yes.

MR. MAZUREK: There are some changes.

THE COURT: The parties have given me the verdict sheet, which is always Court Exhibit 1. We will correct this. We have some changes here.

THE DEPUTY CLERK: What are we doing with the binders?

THE COURT: They can go back.

THE DEPUTY CLERK: We got all the exhibits in.

MR. DISKANT: Except for the binders.

THE DEPUTY CLERK: The binders are going to go back as well.

THE COURT: Correct. That's on the record.

THE DEPUTY CLERK: The government and the defendant agree that what is in these binders are only those transcripts that are in evidence.

MR. MAZUREK: Yes.

THE DEPUTY CLERK: And they have been checked.

MR. MAZUREK: Yes.

THE COURT: You swear it because I had this problem once.

As soon as I can release the court reporter, which is now.

THE COURT: The alternates: Hi, you are not going home yet. Jim is going to take you to a room in case someone gets hit by a bus in the next hour. There are no buses in this building. If something dreadful happened in the next few minutes, we would want to have you here. Don't discuss the case. Keep an open mind.

(Recess pending verdict)

THE COURT: I will tell you what I think can come out. This is the first time I have ever done this because I have never had this many changes done on the fly. This is a much easier way to do this, not for the court reporter, but not to try to correct our copy.

I believe the charge begins on page 1432 and everything I said up until line 12 on page 1450, which is what I said before lunch to the jury, should just go back to the jury.

There was then at pages 1450 and 1451, we spoke out of the presence of the jury. That should not go back to the jury. 1452 is under seal and that will not go back to the jury. Pages 1453 and 1454 were basically said before the jury returned to the courtroom after lunch and should not go back to the jury.

Then we pick up at page 1455. I would strike on page 1457, line 7 to the end of the page. What I would do is, I would strike the first nine lines on the top of page 1459. 1458 is colloquy. All it is, I went back and said something all over again. Rather than send it back to the jury, I would rather say, I am done with that. Let's just go on to the next element. I would take on pages 1 through 9 on 1459 and that looks to me like everything that I would take out of what I was handed.

That, by the way, includes the correction that I made at the end because of the missing not. It's at the end where I said it to the jury.

MR. GOSNELL: They are going to get both instructions.

THE COURT: They will get both. Otherwise, it will make no sense. I don't see anything wrong with the other one,

but I'm happy to do it your way, too.

THE DEPUTY CLERK: The parties agreed?

MS. CUCINELLA: No objection from the government.

MR. MAZUREK: I'm just going through it.

THE COURT: Are we? Ok.

MR. MAZUREK: I have one small correction, your Honor, on page 1460, line 3.

THE COURT: Did the court reporter make a mistake?

MR. MAZUREK: I am not going to attribute anything to anybody. It says: And as I said and --

THE COURT: I said prove. I didn't say proffer. That word should be changed to prove. We are way beyond proffers here. On 1460.

He is going to go ahead and finish that. I will let the jurors go, first the alternates and then the regular jurors, at 5.

I assume we are going to discharge the alternates.

MR. MAZUREK: No objection.

MR. DISKANT: Your Honor, we would prefer that they not be discharged.

THE COURT: Why? I am never going to see them.

MR. DISKANT: I have personally had an instance which in the middle of deliberations --

THE COURT: I have personally gone with 11 jurors because it is the preference in this circuit not to seat jurors

in the middle of deliberations. The Second Circuit has so stated. In other circuits they do it differently. But in the Second Circuit they seem to have this odd preference. Maybe they don't believe jurors can really restart deliberations. I don't know what they believe. You can't deny that that's what they have said.

MR. DISKANT: No, your Honor, as long as the Court is amenable --

THE COURT: I have proceeded in that way in many of most famous and well-known cases, always over the objection of the offense and always being affirmed. Gives me some confidence in the procedure.

(Recess pending verdict)

THE DEPUTY CLERK: There is a note, Court Exhibit 1, Judge.

THE COURT: Before we get to the note, Court Exhibit 1, we now have the charge which will actually be Court Exhibit 2 and I am going to sign it and I'll ask counsel to sign it with the omissions as noted. This is Court Exhibit 2. Counsel could initial that. We will get that to the jurors.

The second thing that we have to deal with, I have a jury note, Court Exhibit 1. We need the copy of the transcript by Abraham Correa. Returning to Correa and Ray Williams having worked with Dr. Mirilishvili in the Bronx before moving to Manhattan.

I understand that the government has identified two bits of transcript that the government believes are relevant and that is page 322, line 6 through page 330, line 9, and then page 333, line 10 through page 335, line 20. Has the government identified anything in the cross that would be relevant to that? This is all in the direct.

MR. DISKANT: I don't believe it came up on cross.

MR. MAZUREK: Judge, the question that the jury has asked I think can simply be answered that there is none because the question is whether the testimony from Mr. Correa referring to Correa and Ray Williams having worked with Dr. Mirilishvili in the Bronx, there is no testimony that Ray Williams and Abraham Correa worked with Dr. Mirilishvili in the Bronx. There is only testimony that Abraham Correa worked with Dr. Mirilishvili in the Manhattan clinic. I think that the answer is fairly easy.

THE COURT: Hang on a second. Please explain the Bronx reference to me in page 322.

MR. DISKANT: Certainly, your Honor.

THE COURT: I don't see the word Bronx.

MR. DISKANT: If you keep scrolling through you will get there.

THE COURT: Let's get to the word Bronx and then I'll work around it. Where is the word Bronx?

MR. DISKANT: It's the time period, your Honor.

THE COURT: I'm not interested in time periods. I'm interested in the word Bronx.

MR. DISKANT: Page 328, he identifies the location of the events he has been testifying as 145th Street in the Bronx.

THE COURT: When you first saw the defendant in September of 2012, where were the defendant's offices located? He had various offices in the Bronx. I am going to assume that the government's response is, it all depends on your definition of working.

MR. DISKANT: That's exactly right, your Honor. I don't think we need to resolve that issue. It seems very clear that the jury is asking for the testimony that pertained to what Mr. Correa and Mr. Obama were doing with respect to the defendant while the defendant was located in the Bronx and this section is exactly that testimony.

MR. MAZUREK: Your Honor, I object to that. The question is, having worked with Dr. Mirilishvili and there has been testimony in this trial --

THE COURT: If they are coconspirators, they were working together.

MR. MAZUREK: That's the government's interpretation.

THE COURT: That's the government's interpretation and for all I know it's the jury's. I think it's a perfectly fair interpretation of the note.

MR. MAZUREK: I think the Court should inquire as to

what is meant by -- to me it's very clear.

THE COURT: I am not going to inquire about what is meant. There is a fair and plausible interpretation of the evidence.

MR. MAZUREK: It's not the question that's asked. There is testimony in the trial that Abraham Correa was employed by the doctor.

THE COURT: They didn't say employed. They said working with.

MR. MAZUREK: Having worked with.

THE COURT: Worked is not necessarily a synonym for employed. Coconspirators work together to violate the law.

MR. MAZUREK: But you are assuming --

THE COURT: I'm assuming nothing.

MR. MAZUREK: The plain meaning of worked is to have been a part of the organization and done things --

THE COURT: The organization, according to the government, is a pill mill. The problem is --

MR. MAZUREK: Not in the Bronx. The Bronx is a group practice that Dr. Mirilishvili was a part of. This is before moving to Manhattan. There is no evidence that Ray Williams and Abraham Correa worked with Dr. Mirilishvili in the Bronx. The only evidence in the transcripts, your Honor, are that Abraham Correa began to be a patient of Dr. Mirilishvili in September of 2012.

THE COURT: But he didn't testify that he became a patient.

MR. MAZUREK: Yes, he did.

THE COURT: He testified that he got prescriptions from Dr. Mirilishvili, which he filled at a pharmacy. He didn't testify that he took any at all.

MR. MAZUREK: He went to that location and lied and presented fake paperwork.

THE COURT: Excuse me. There is nothing in this testimony by Mr. Correa that indicates that Mr. Correa was actually a legitimate patient. He got involved in oxycodone because it was Obama who told him it was a guaranteed way of making money.

MR. MAZUREK: But he also testified that he lied throughout the examination and he gave information regarding an injury that he sustained from falling off a scaffolding stairs. That's also part of his testimony. And that he gave testimony that he had spent time in Mount Sinai Hospital before coming there as a result of that injury. And he also gave testimony that he told Dr. Mirilishvili that he was in pain.

THE COURT: Here is what I am going to show the jury in the first thing. I am going to start at page 322, line 6 and I am going to end at page 322, line 17. If the jury wants more, the jury can ask for more.

MR. DISKANT: Your Honor, so the Court is aware, we

identified in response to the Court's question one instance on cross-examination when it came up, so the Court is aware of it.

THE COURT: I should be aware of it because they want everything.

MR. DISKANT: 437 at line 5.

THE COURT: I don't have 437.

MR. DISKANT: It's the next day, your Honor.

THE DEPUTY CLERK: We are talking the 9th?

MR. DISKANT: The 8th.

MR. MAZUREK: I have a lot more. Any contact between the doctor and Abraham Correa in the Bronx, there is a lot more testimony.

THE COURT: We are going to have to do this at 9:00 tomorrow morning because I have to leave. I was here until 8:30 last night. I have to leave. I said the jury had to go.

What you will do is, you will identify for me everything that you think is responsive, each of you. I will review the transcript when I come in in the morning. I will come in here and I will rule. That will be it. Let's start with the alternates. The government should tell me what the next thing is it thinks should come in.

MR. DISKANT: Yes, your Honor. The cross. 437, line 5 through 439, line 1.

THE COURT: While we are waiting for the alternates, you can tell me what you think should come in, please.

MR. MAZUREK: Obviously, I don't think any of this should come in.

THE COURT: Excuse me. Tell me what you think should come in. If the answer is nothing, then there is nothing. Then I can rule right now.

MR. MAZUREK: I have not gotten through it all yet, your Honor. I have identified 426, line 14 through 18. I do need additional time. I just haven't had a chance to go through it.

THE COURT: You have not had a chance to go through it. I will expect and it has to be in my office tonight in e-mail form by 7 p.m. all of your proposed designations, an e-mail to Mr. O'Neil by 7 p.m. tonight with all of your proposed designations. That gives you two hours. You will never have two hours again to engage in this exercise.

THE DEPUTY CLERK: Alternates, bring them inside.

(Jury alternates present)

THE COURT: I think there must be nothing more frustrating than being an alternate juror. But you saw, because we had a juror who got sick, how important it is to be an alternate juror, and you never know when that's going to happen.

I'm going to at this moment let you go for the day. I am actually not going to do what I told the lawyers I was going to do. I am not going to discharge you. The jury has been

deliberating for about an hour, an hour and 15 minutes. And if somebody did get hit by a bus on the way to court tomorrow, I think I would stop everything and I would call you. There will come a point tomorrow when you will be officially discharged, if nothing happens, once they are down the road in their deliberations a little bit further.

It may be that I won't see you ever again, which is very sad, because I have a special place in my heart for this jury. I loved the voir dire. I had more fun during the voir dire than I can remember having in a voir dire in the longest time. It was the nicest group of people. And you've obviously all bonded. At the same time, we have been engaged in some very hard work and you've been attentive and you've been prompt and you've been there for me and for the parties and we are all deeply grateful for that.

In the event that nobody gets hit by a bus and I don't see you some time tomorrow morning, I will say a tentative good-bye and thank you so very, very much.

I'll ask you tonight, don't discuss the case. Keep an open mind. And I will also tell you this. There are no two people on the planet who have more right to know what the verdict is than the two of you, and we will call you and let you know after it's handed down. We will not leave you hanging.

JUROR: We don't have to come in tomorrow.

THE COURT: Don't bother to come in tomorrow. Make sure Jim knows where he can reach you.

THE DEPUTY CLERK: Your contact information is good.

JURORS: Yes.

THE COURT: I am going to excuse you.

(Jury alternates excused)

THE COURT: Can I get the rest of the jurors, please.

THE DEPUTY CLERK: Yes, Judge.

(Jury present)

THE COURT: It's 5 after 5. We have more work to do on this getting you the transcript thing, and it's late and I am going to let you go for the day. When you get in in the morning, probably reasonably soon after you are all here, we will have those transcripts back to you.

Don't discuss the case tonight. Keep an open mind. And when you arrive, you just go into the jury room. When all 12 of you are present, knock on the door, Jim or the court security officer will be here, poke your head out, say we are all here, and then begin your deliberations. We will be working on this.

Thank you. 9:30 would be great, folks.

(Jury not present)

THE COURT: See you in the morning.

(Adjourned to Thursday, March 17, 2016, at 9:00 a.m.)